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No. _____

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IN THE

Supreme Court of the United States

October Term, 1983

STANLEY McDONALD, NORMAN R. HAGFORS and CLAYTON JENSEN,

Petitioners,

vs.

JOHNSON & JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

Question No. 1

Do the principals of a new venture, seeking financial and marketing assistance, have standing under the antitrust laws to sue a firm that obtains control of their new venture for the purpose of suppressing it?

Question No. 2

Is acquisition for the purpose of suppression a per se violation of Section 1 of the Sherman Act?

Question No. 3

Did the district court in this case correctly sustain the jury's award of antitrust damages?

Question No. 4

Do 28 U.S.C. § 2111 and Rule 103(a) of the Federal Rules of Evidence preclude the reversal of a punitive damage award for fraud on the basis of isolated comments by plaintiffs' counsel as to the defendant's motive, not objected to by the defendant, during two days of closing argument at the end of a five-month trial, which defendant admitted was a fair trial?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petition for Certiorari

Petitioners, Stanley McDonald, Norman R. Hagfors, and Clayton Jensen, respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on November 16, 1983, as modified on January 12, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on November 16, 1983, and modified on January 12, 1984. It is reported in *McDonald v. Johnson & Johnson,* 722 F.2d 1370 (8th Cir. 1983) (Appendix "A"). The opinion of

the United States District Court for the District of Minnesota denying post-trial motions that was appealed to the Eighth Circuit is reported in *McDonald v. Johnson & Johnson*, 537 F.Supp. 1282 (D. Minn. 1982) (Appendix "B").

Jurisdiction

The judgment of the Eighth Circuit was entered on November 16, 1983. Both sides filed timely petitions for rehearing. The Eighth Circuit denied petitioners' petition, and granted respondent's petition in part on January 12, 1984 (Appendix "C"). The respondent filed a second petition for rehearing, which the Court of Appeals denied in an amended order of February 28, 1984 (Appendix "D"). The petitioners have timely filed this petition for a writ of certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

The following statutes are quoted in Appendix E:

Sherman Antitrust Act, §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1976).

Clayton Antitrust Act, §§ 4, 7, 38 Stat. 730, as amended, 15 U.S.C. §§ 15, 18 (1976).

63 Stat. 105, 28 U.S.C. § 2111, harmless error (1949).

88 Stat. 1959, as amended, Federal Rule of Evidence 103(a) (1975).

Statement of the Case

This petition presents the question of whether the antitrust laws

provide a remedy against acquisition of a new idea or product for the purpose of suppressing it.

The petitioners (hereafter "plaintiffs") are three individuals, residents of the State of Minnesota, who, in a basement workshop, developed a safe and effective cure for pain, an electronic device known as a transcutaneous electrical nerve stimulator ("TENS" device).

The respondent in this case, Johnson & Johnson (hereafter "J&J"), is the world's largest health care company and marketer of pain control drugs (e.g., Tylenol), which in 1974 acquired the plaintiffs' business for the purpose of suppressing it and foreclosing competition between TENS and J&J's pain control drugs.

The plaintiffs commenced this action on May 2, 1979 in the United States District Court for the District of Minnesota.[1] Trial in this case commenced January 20, 1981, before a jury and The Honorable Miles W. Lord, Chief United States District Judge, and concluded with a jury verdict on July 2, 1981, JA 10, 15, finding that:

> (1) J&J had breached its acquisition agreement with the plaintiffs, and caused damages of $5.7 million.
>
> (2) J&J had defrauded the plaintiffs, and caused actual damages of $6,275,000.00, by means of conduct sufficiently culpable to warrant an award of punitive damages of $25 million.
>
> (3) J&J had violated Sections 1 and 2 of the Sherman Act, and caused damages of $56.8 million.[2]

Pursuant to the jury verdict, the court entered judgment on July 17, 1981, in the alternative, with the amounts being entered in

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[1]Joint Appendix in the United States Court of Appeals for the Eighth Circuit, No. 82-1594-MN ("JA") 2. The plaintiffs invoked the trial court's jurisdiction pursuant to Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26) and 28 U.S.C. § 1337 with respect to the plaintiffs' antitrust claims, and pursuant to 28 U.S.C. § 1332, diversity of citizenship, with regard to the plaintiffs' common law claims. JA 24-25.

[2]JA 78-82. The jury returned a verdict in J&J's favor on claims of violation of Clayton Act § 7 and Sherman Act § 2 conspiracy to monopolize.

descending order of size.[3] On April 14, 1982, the trial court denied J&J's post-trial motions and sustained the jury verdict in all respects.[4]

J&J appealed to the United States Court of Appeals for the Eighth Circuit, which, on November 16, 1983, in a 2-1 decision by Chief Judge Lay, joined by Judge Fagg, affirmed in part and reversed in part. The majority opinion reversed the plaintiffs' antitrust judgment on the ground of lack of standing, and ordered judgment for J&J. The majority found, however, that J&J had committed fraud, and affirmed the award of actual damages for fraud. The majority reversed the punitive damage award on the ground that the plaintiffs had impermissibly argued that the jury could base its award on J&J's suppression of TENS, a public injury that the majority held to be unrelated to J&J's fraud. The majority ordered a new trial on the fraud claim on punitive damages only.[5]

In a separate concurring and dissenting opinion, Judge Heaney agreed with the majority's affirmance of the fraud judgment, but dissented from the reversal of the plaintiffs' punitive damage award of $25 million. The dissent found the plaintiffs' closing argument to be proper, and the amount of the punitive damage award to be in conformance with applicable law and the evidence. On the antitrust judgment, the dissent found that the plaintiffs had standing to bring their antitrust claims. The dissent also found that the evidence was sufficient to sustain a judgment for a violation of Section 1 of the Sherman Act under the rule of reason, and would have remanded

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[3]JA-83-86. Because the court had previously severed an amended counterclaim asserted by J&J for trial at a later date, the court entered judgment with a certification as provided by F.R.C.P. 54(b), so as to permit an immediate appeal of the judgment.

[4]*McDonald v. Johnson & Johnson*, 537 F.Supp. 1282 (D. Minn. 1982).

[5]*McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983). The allegedly improper argument appears at four pages of the 13,271 page trial transcript during two days of closing argument at the end of the five-month trial. 722 F.2d at 1381-82; trial transcript ("T") 13159-60, 13167-68. J&J never objected to the argument, and admitted four times during the trial, the last time when the jury was deliberating *after* closing argument, that J&J had received a fair trial. 537 F.Supp. at 1321; T.324-25, 5449, 7536, 13215.

for a new trial under the rule of reason.[6]

On January 14, 1984, the majority modified its previous opinion and ordered the plaintiffs to retry their entire fraud claim, because the majority found the issues of punitive damages, actual damages, and liability to be not readily separable. The majority then reviewed the judgment for breach of contract, found sufficient evidence to sustain the verdict, and affirmed. Judge Heaney again dissented, for the reasons set forth in his prior dissenting opinion. 722 F.2d at 1388-89. On February 28, 1984, the court denied rehearing and rehearing en banc on the contract judgment.[7]

The relevant evidence at trial, for purposes of this petition, establishes the following:

In 1971, plaintiff Norman R. Hagfors designed and built in his basement the first modern solid state TENS devices for the treatment of pain. Subsequently, the other plaintiffs joined to start Stimulation Technology, Inc. ("StimTech"), a Minnesota corporation engaged in the business of marketing TENS, as well as a cardiac pacemaker made under license from a British company, Devices, Limited ("Devices"). 537 F.Supp. at 1289-91.

The plaintiffs' early research and experience showed TENS to be safe and effective in treating 20% to 50% of chronic pain (over six months in duration), 80% of acute pain (short term), and almost all post-operative pain. Chronic pain patients spend more than $300 million per year for drugs, which are addictive, harmful, and ineffective. In the United States, chronic pain syndromes cost the American people $45 billion to $60 billion annually for health services, loss of work, and compensation payments. Many people would not become chronic pain sufferers if initially treated with

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[6]The dissent concluded with an admonition that the courts not "continue to dilute our antitrust laws," and added, "...we cannot permit a company that is dominant in a relevant market to acquire a smaller company that has perfected a competing product with an intent to suppress that product and then carry out that intent. Such conduct is clearly in violation of the antitrust laws." 722F2d at 1383-88.

[7]Amended Order Denying Rehearing and Rehearing En Banc (Appendix "D").

TENS. Among the conditions found treatable with TENS are high and low back pain, neck pain, headaches, localized arthritis, athletic strains and sprains, post-surgical pain, menstrual pain, phantom limb syndrome, pain in childbirth delivery, causalgia, and neuralgia. In this market, drug sales are approximately $1 billion annually in the United States.[8]

This was the market the plaintiffs sought to enter with TENS devices. The problem, however, was that no TENS company could hope to compete against the drug companies without a massive spending campaign to overcome the ignorance of physicians and the public about TENS devices, and to wean them away from drugs.[9]

Of all the firms in the market, J&J was by far the strongest. From 1971 through 1980, J&J's regular Tylenol, sold over-the-counter, more than tripled in sales, and became the number one OTC analgesic, with a 27% market share, bigger than its next three largest competitors (Bayer, Anacin, and Bufferin) combined![10]In the prescription area, J&J brought Tylenol with codeine from number 127 among U.S. prescription drugs in 1971 to number 1 in 1980, primarily through a ten-year program to promote the drug and educate physicians to its benefits.[11] From 1975 through 1979, J&J's combined sales for the two drugs were

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[8]537 F.Supp. at 1342-44; Plaintiffs' Exhibit ("PX") 382, 567; Defendant's Exhibit ("DX") 346-49.

[9]537 F.Supp. at 1290, 1342-44; T.318-19, 321-32, 1077-81, 1134-46, 3332-34, 3507-15, 3523-28, 3546-49, 3550-54, 3558-70, 3577-88, 3855-58, 8448-57, 8830-32, 8846-47, 8849-50, 8855, 8857-60, 8925, 10827-28, 11120-22, 11224-30, 11341-45, 11367-69, 11373, 11826, 12056, 12085-86, 12191-92; PX 96, 382, 563, 567, 758, 759, 1099, 1100.

[10]537 F.Supp. at 1310, 1346; T.2830-39, 9074-76, 12567-68; PX 940. J&J routed its only serious competition, Bristol-Myers, which sought to launch Datril as a competitive product in 1975. J&J's response was to add 200 salesmen to the Tylenol sales force, cut the price of Tylenol 30%, and write rebate checks of $23 million in one week. 537 F.Supp. at 1310-11, 1346; T.204, 2850-62, 3884-87, 6183-93, 7131-33, 8549-52, 9828-30; PX 388, 389, 391, 939.

[11]537 F.Supp. at 1310, 1345; T.2826-39, 2892-94, 8587-88; PX 940, 1141, 1197.

were $690,476,000.00, with combined profit of $134,400,000.00.[12] In 1980, J&J launched a new prescription pain control drug, Zomax, despite side effects one executive described as "terrifying."[13] Research and development expenses for Zomax exceeded $14 million; first year promotional expenses exceeded $13 million; the initial sales force exceeded 500; first year free samples had a retail value of $29 million; and product distribution was "100% penetration at launch," every retail outlet in the United States. First year sales projections were that Zomax would capture more than 10% of the prescription market; Zomax did better.[14] While the appeal in this case was pending in the Eighth Circuit, J&J withdrew Zomax because of deaths and adverse reactions.

The foregoing is in marked contrast to what happened during the same period of time to the plaintiffs.

By 1973, the plaintiffs had started marketing cardiac pacemakers and TENS devices. Their plans were to use the pacemakers, an accepted product line, as the "bread and butter" to finance TENS. The plaintiffs also had plans to develop new and advanced products, such as a lithium pacemaker, a programmable pacemaker, improved TENS devices, and TENS electrodes. The plaintiffs estimated a need for $7 million start-up financing, and planned to raise $5 million of this amount through stock offerings.[15]

At this point, J&J first approached the plaintiffs to express interest in acquiring StimTech. As a condition to negotiations, J&J required the plaintiffs to terminate negotiations with other potential investors. Impressed by J&J's apparent sincerity, plaintiffs did

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[12]537 F.Supp. at 1311, T.2830-39; DX 345.

[13]537 F.Supp. at 1311, 1346, fn 9; T.10141-43.

[14]537 F.Supp. at 1311, 1345-46; T.2882-92, 6283-88, 7352, 8060-81, 8289-92, 8688-91, 8694-96, 8703-21, 8727-66, 8796-97, 8982, 8996-99, 9005-07, 9033-39, 9061-64, 9096-98, 9115-16, 10097-100, 10141-46, 12567-68; PX 1150, 1221, 1224.

[15]537 F.Supp. at 1290-92; T.394-401, 530-41, 545-47, 655, 1763-74, 1787-88, 2116-18, 2120-21, 2332-40, 2344-48, 2430, 2563, 2570-75, 8505-07; PX 692, 970, 1204, 1207.

so, and were thus cut off from other investors. At the time, J&J executives privately viewed electronic control of pain as potentially the next large growth area of medicine.[16]

On September 5, 1973, the plaintiffs sold J&J 37% of the stock of StimTech, and agreed to negotiate for a sale of the remainder, based on J&J's representations that it would provide many kinds of substantial assistance to the business and keep the plaintiffs with the business to run it if a sale occurred.[17]

Subsequently, negotiations led to a September 20, 1974, agreement pursuant to which J&J acquired the remainder of the plaintiffs' stock. The price was payable over the next five years, with the plaintiffs receiving $2.00 for every dollar of profit earned by StimTech, with a minimum of $1.3 million and a possible maximum of $7 million. At the same time, J&J obtained three-year employment and five-year non-compete agreements with the plaintiffs. A key term of the stock purchase agreement was paragraph 10(a), obligating the plaintiffs and J&J to work toward the future success of StimTech.[18]

The employment and non-compete agreements were essential to J&J, which, from the outset of the negotiations, viewed the principal assets of StimTech as being the knowledge, experience, and abilities of the individual plaintiffs.[19]

To induce the plaintiffs to enter into this transaction, J&J represented that it would invest substantial, adequate, and immediate funds in StimTech[20]; that the plaintiffs would receive large long-term financial benefits as J&J executives; that J&J was "only satisfied to be

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[16]537 F.Supp. at 1292-96; T.526-30, 614-17, 1782-85, 2382-86, 2579-82, 3681-89, 3700-05, 3710-16, 4308-09, 4990-91; PX 1-4, 967.

[17]722 F.2d at 1379-80; 537 F.Supp. at 1292-94, 1352-53; T.470-71, 1792-93, 2590-95, 5012-24, 5288, 5291-93; PX 2, 1170; PX 13, 28.

[18]722 F.2d at 1372, 1389; 537 F.Supp. at 1299-1300; PX 67, 70, 257, 258.

[19]537 F.Supp. at 1294, 1327-28; T.207, 4998, 5005-07, 5065, 5685, 10837-39, 10844-46.

[20]537 F.Supp. at 1297; T.662-66, 680-83, 697-99, 2392-2400, 2620-22, 2626-27, 3775-82, 3793-95, 3804-05, 5687-88, 7423-24; PX 32, 34, 35, 41; DX 59.

number one," and would make Devices and StimTech "tops in pacer business," and had the "resources and will put them to work"[21]; that StimTech could use the worldwide J&J distribution network and sales force; that the J&J name would be behind StimTech; and that J&J would assist StimTech in the development of new products.[22]

Subsequent to the acquisition of StimTech, however, even within the first 90 days, J&J acted completely contrary to its promises and representations, and embarked upon a course of conduct consistent only with suppression. As enumerated by the Eighth Circuit and trial court, J&J's acts of suppression included a wide range of restrictions imposed on the plaintiffs and their business, and ran the gamut from denying funds to the business, to demoting and humiliating the plaintiffs, to blocking new products, to restricting marketing and sales, to prohibiting use of the J&J name, and much more.[23]

Throughout its ownership of StimTech, J&J knowingly restrained and failed to support the business, with the result that StimTech showed only losses during the 1975-79 earnout period, and the plaintiffs received nothing for their business beyond the $1,300,000 minimum payment. 537 F.Supp. at 1300-09, 1311-19.

Significantly, the very same top-level executives of J&J were responsible both for the denial of J&J's resources to the plaintiffs and StimTech, and for the contemporaneous commitment of those resources to pain control drugs.[24]

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[21] 722 F.2d at 1379; 537 F.Supp. at 1297-98, 1352; T.694-96, 1801-05, 1831-34, 1836-37, 2632-47, 3800-03, 3807-18, 3824-29, 4693, 4949-52; PX 46, 549, 1193.

[22] 722 F.2d at 1379-80; 537 F.Supp. at 1298-99, 1352; T.225, 541-45, 575-81, 618-21, 1241-46, 1302-03, 1585-88, 1616-19, 1621-24, 1630-31, 1785-87, 1834-45, 1862-64, 2000-01, 2042-43, 2264-65, 2268-70, 2690-703, 2712-14, 2909-11, 3798-99, 3835-36, 3839, 4391-94, 4667-68, 4671-74, 4781-86, 4803-06, 5011, 5083, 5182-83, 5198-200, 5282-83, 5342-45, 5490-91, 5760-63.

[23] 722 F.2d at 1380, f.11 quoting 537 F.Supp. at 1352; see, also, 722 F.2d at 1389, 537 F.Supp. at 1282, 1349-50.

[24] 537 F.Supp. at 1289, 1292-93; T.2879-82, 2963, 3261-62, 3313, 3324-26, 3335-36, 3373-76, 3667-80, 3689-90, 3745-47, 3762-72, 3775-82, 3824-29, 3846, 3850-55, 3860, 3862-64, 3868-70, 3884-87, 4980-81, 4983, 5905-09, 6163A-C, 6183-93, 6218, 6225-30, 6294-302, 7004-05, 7026-30, 7078-80, 7122-23, 7183-84, 7274-83, 7329-31,

ARGUMENT

I.

This Court Should Grant Certiorari to Make Clear that the Antitrust Laws Confer Standing Upon the Plaintiffs to Maintain this Action

Perhaps the oldest American dream is that an inventor, working alone, will come up with an idea that will benefit all mankind, and successfully market it. Perhaps the oldest American nightmare is that a large corporation will gain control over that new idea in order to suppress it. This case presents both—the development of a cure for pain and its suppression by the largest health care company in the world. The question presented is whether the antitrust laws provide a remedy to those subjected to this most pernicious restraint of trade.

Because of the importance of assuring that entrepreneurs who are victims of suppression have standing to bring suit under the antitrust laws, and because of the importance of assuring that lower courts properly interpret and apply this Court's decisions on antitrust standing, plaintiffs ask this Court to grant certiorari.

Both the trial judge and the dissent in the Eighth Circuit concluded that the plaintiffs had standing to maintain their antitrust claims. In denying standing, however, the majority failed to follow this Court's decisions in three controlling cases—*Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); and *Associated General Contractors v. California State Council of Carpenters*, ____ U.S. ____, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

In *Perkins, supra*, cited with approval in *Blue Shield of Virginia*, 457 U.S. 475 at fn.12, this Court found antitrust standing for cor-

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7351-52, 7354-76, 7372-78, 7943, 9011-27, 9502, 9555-59, 9564, 9789-90, 9840-41, 9866-70, 9882-83, 9921-22, 9950-55, 9961-64, 9969, 9976-77, 10130-35, 10541-44, 10574-84, 10662-65, 12645; PX 1-4, 25, 27, 32, 46, 51, 96, 100, 241, 278, 374, 377, 404, 438, 471, 484, 549, 562, 563, 733, 982, 1103, 1134; DX 266.

porations four levels removed from price discrimination, and for their controlling shareholder, five levels removed, who was permitted to recover amounts payable from the corporations and lost as a result of the discrimination. 395 U.S. at 649. The Court found that the shareholder, the "principal victim" of the violation, was "directly injured" and "clearly entitled" to bring suit. Accordingly, "he was entitled to present evidence of all of his losses to the jury." 395 U.S. at 649-50. Under *Perkins*, the plaintiffs in this case had standing, in that they were much more immediately affected by J&J's violation. Like Perkins, the plaintiffs were no mere innocent bystanders: as part of its plan to suppress, J&J intended to and did eliminate the plaintiffs personally as competitors. For the Eighth Circuit majority to have denied standing was to contravene this Court in *Perkins*.

Similarly, the majority acted contrary to the opinion of this Court in *Blue Shield of Virginia v. McCready, supra.* In that case, the Court found antitrust standing for a plaintiff claiming that she could not receive insurance reimbursement for treatment by a psychologist because of a conspiracy among psychiatrists and health insurers directed against psychologists. The plaintiff was thus a customer of the target or victim of the conspiracy. Nonetheless, the Court found the plaintiff to have standing in light of the broad remedial purposes of the antitrust laws, and the policy against placing artificial limitations on the ability of private plaintiffs to enforce them.[25]

The Court noted that the only limitations on standing occur when a plaintiff falls within a particular class that the courts have chosen not to protect, or when the plaintiff sustains injuries too remote from the violation. The Court found neither to exist in the *Blue Shield* case. The harm to the plaintiff was clearly foreseeable and was a necessary step and integral aspect in the effectuation of the

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[25]457 U.S. at 472, 473, fn.10.

alleged conspiracy. 457 U.S. at 479. The plaintiff was alleging a purposefully anticompetitive scheme, and seeking to recover for an injury "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." 457 U.S. at 484.

In denying standing in this case, the Eighth Circuit majority disregarded and misapplied the principles of *Blue Shield of Virginia.* Standing for the plaintiffs in this case will in no way create a risk of duplicative recovery, or unduly complicate litigation by creating difficult questions as to the apportionment of damages. Denying standing, however, will have the direct result of allowing a serious violation of the antitrust laws to go unpunished, denying compensation to the victims, and permitting the violator to retain the fruits of the violation—all concerns in *Blue Shield of Virginia.*

The violation alleged by the plaintiffs here is the acquisition of the plaintiffs' business for the purpose of suppressing it. The pleading and proof were that J&J not only intended, but absolutely needed to eliminate the plaintiffs personally as competitors in order to make the scheme fully effective. Accordingly, as this Court required in *Blue Shield of Virginia*, the injury to the plaintiffs was clearly foreseeable, a necessary step in effecting the conspiracy, and an integral aspect of its implementation. The plaintiffs alleged and proved a purposefully anticompetitive scheme, in which their injuries were both intended and inextricably intertwined with the injury J&J sought to inflict on the TENS industry. For the Eighth Circuit majority to have held otherwise was to misinterpret a controlling decision.

The third controlling authority misapplied by the Eighth Circuit majority was *Associated General Contractors v. California State Council of Carpenters, supra*, where this Court found no standing for the plaintiff Unions to bring an action against a multi-employer association for coercing "certain third parties, as well as some of

the association's members, to enter into business relationships with non-union firms," thereby depriving the Union's members of employment and wages. 74 L.Ed.2d at 727. In reaching its conclusion, the Court set out a list of factors to be weighed and evaluated in deciding if a particular plaintiff has standing under the antitrust laws. These factors include a causal connection between the violation and injury, 74 L.Ed.2d at 737; intent to injure the plaintiff[26]; the intent of the antitrust laws to prevent the plaintiff's injury[27]; the plaintiff's proximity to the defendant in the chain of causation, 74 L.Ed.2d at 739; the existence of more closely situated plaintiffs likely to bring suit, 74 L.Ed.2d at 740-41; the degree of speculativeness of the plaintiff's damage, 74 L.Ed.2d at 741; and the likelihood of duplicative recovery, or undue complexity of litigation in an effort to avoid duplicative recovery, 74 L.Ed.2d at 741-42.

Although the Eighth Circuit majority purported to apply these factors, it misapplied them and reached a result directly opposite to what the decision requires. The majority found that the plaintiffs lacked standing because "(1) plaintiffs voluntarily withdrew themselves from competition; (2) there was no causal connection between plaintiffs' harm and the alleged market restraints; (3) there was only speculative damage shown; and (4) any injury plaintiffs had shown was not of a type that Congress sought to redress under the antitrust laws." 722 F.2d at 1379. In all four respects, the majority's findings are erroneous and contrary to *Associated General Contractors*.

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[26] *Ibid.* "Moreover, there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under Section 4." 73 L.Ed.2d at 737, n.35.

[27] 74 L.Ed.2d at 738. "As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and *our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.*" *Ibid.*; emphasis added, citing, with approval, *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972): "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom in our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

First, in no sense did the plaintiffs voluntarily withdraw themselves from competition.[28] To the contrary, as the trial court and dissent properly found, the plaintiffs were seeking to *enter* the market with the assistance and support of J&J.[29]

Moreover, the agreement with J&J *required* the plaintiffs to participate in the TENS industry after the acquisition: paragraph 10(a) obligated the plaintiffs, as well as J&J, to "act in such a way as to promote to the extent reasonably possible the successful operation and growth of the company." 722 F.2d at 1389.

This Court has long held that in antitrust cases, courts are to look at the substance rather than the form of transactions. *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *United States v. American Tobacco Co.*, 221 U.S. 106, 180-81 (1911). Here the plaintiffs were seeking help for their business, not a buyer to take the business off their hands. If the plaintiffs and J&J had entered into a loan or marketing agreement, or virtually any other arrangement short of a sale, there would be no question of the plaintiffs' standing to sue for suppression of the business. See, *e.g.*, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 F. 254 (2d Cir. 1908).

That the transaction took the form of a sale should not result in a denial of plaintiffs' standing, particularly where a crucial aspect of the transaction, at least to the plaintiffs, was that they would continue to operate the business with J&J's full support. Indeed, to deny standing because the transaction took the form of a sale is to reward J&J for its wrongdoing inasmuch as the transaction was a sale only because J&J insisted on a sale so as to be able better to suppress the

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[28] In so holding the majority purported to rely on a line of cases denying standing to a plaintiff who sells his business in order to leave a market. 722 F.2d at 1374-75; see, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981); *Turner v. Johnson & Johnson*, 549 F.Supp. 807 (D. Mass. 1982); and other cases cited *ibid.*

[29] 722 F.2d at 1384; 537 F.Supp. at 1329.

business afterward.[30]

The majority also committed a fundamental error in finding no causal connection between the plaintiffs' injury and the violation, and in finding the damages to be speculative. In so holding, the majority misconceived the premise of the plaintiffs' damage theory by assuming that the plaintiffs were suing to recover as antitrust damages their unpaid contractual earnout.

Rather, the plaintiffs calculated their damages based on what would have happened to the business in the absence of any transactions with J&J, since the plaintiffs would never have dealt with J&J at all or sold any part of their business to J&J, had they known of J&J's preexisting intent to suppress TENS—a proposition all three plaintiffs confirmed in their trial testimony.

The Eighth Circuit majority, however, overlooked this entirely valid premise of the plaintiffs' damage evidence and further termed the plaintiffs' damages highly speculative. In so holding, the majority disregarded this Court's controlling decisions on antitrust damages. The damages sought by the plaintiffs were no more speculative than lost profits and capital values sought by any antitrust plaintiff excluded from a market, damages long recognized by this Court to be recoverable. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 115 fn.10, 123 (1969); see, also, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927).[31]

Nor did the majority correctly find that the plaintiffs' injury was

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[30]537 F.Supp. at 1327. The plaintiffs' status as employees also did not bar standing, because when employees and shareholders become intended victims and direct targets of antitrust violations, they have standing to sue. *Perkins, supra; Radovich v. National Football League*, 352 U.S. 445 (1957).

[31]The Eighth Circuit dissent had no trouble finding, "The damages are reasonably susceptible of measurement." 722 F.2d at 1384. The trial court of course sustained the award as being consistent with the law and the evidence. 537 F.Supp. at 1356-63.

not of a type that Congress sought to redress under the antitrust laws, in that the majority again wrongly assumed that the plaintiffs were seeking the lost earnout as antitrust damages, instead of the lost profits and capital value plaintiffs would have realized from the business in the absence of any stock sales to J&J. The plaintiffs had a business; J&J acquired it to destroy it; and the plaintiffs proved as damages the profits and value the business would have had in the absence of J&J's involvement. These are exactly the type of damages and injuries Congress intended the antitrust laws to redress.

This Court has long recognized that one of the fundamental purposes of the antitrust laws is to protect the freedom of individual traders and entrepreneurs, such as the plaintiffs, and to afford redress for injuries suffered at the hands of larger competitors. *Associated General Contractors, supra,* at 738, fn.38; *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Fashion Originators Guild v. FTC*, 312 U.S. 457, 476 (1941)[32]; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213-14 (1959)[33]; *United States v. General Motors Corp.*, 348 U.S. 127, 144-45, 146-47 (1966); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

The Eighth Circuit majority further misconceived or ignored the significance of the plaintiffs' employment and non-compete agreements as bearing on the plaintiffs' standing. These agreements, the evidence showed, were part and parcel of J&J's scheme to suppress the plaintiffs' TENS business, and further

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[32] "For as this Court has said, 'trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.'" *Id.* at 476, quoting from *United States v. Trans Missouri Freight Association*, 166 U.S. 290, 324 (1897).

[33] "As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." Quoting from *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

demonstrated J&J's specific intent to restrain the plaintiffs personally. 537 F.Supp. at 1327-29.

That the covenants standing alone may have been lawful is of no moment, since the court must view the plaintiffs' proof as a whole[34]; an unlawful conspiracy may consist of wholly innocent acts[35]; and an otherwise lawful act that is part of an unlawful conspiracy thereby becomes culpable under the antitrust laws.[36]

Application of the other factors listed in *Associated General Contractors* also shows the plaintiffs clearly to have antitrust standing. There was a direct causal connection between the violation and the injury; J&J in fact intended to injure the plaintiffs personally; the plaintiffs' injury was immediate and not remote in the chain of causation; there are no more closely situated classes of plaintiffs likely to bring suit (*e.g.*, StimTech cannot), so that if the plaintiffs cannot sue, no one will, and J&J will retain the fruits of its wrongdoing; and permitting suit will neither subject J&J to the risk of duplicative recovery, nor unduly complicate litigation with problems of complex apportionment of damages.[37]

This Court has in the past granted certiorari where a Court of Appeals has "seemed to threaten the effectiveness of the private

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[34]*Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 698-99 (1962).

[35]*American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 152-53 (1948).

[36]*Continental Ore*, *supra*, at 707; *Paramount Pictures*, *ibid.* See, also, *United States v. General Motors Corp.*, *supra*, at 142. The majority was further incorrect in stating that this case did not present a situation involving "competitors who forced or attempted to force other competitors to sell out to them by threats or other predatory conduct, and extracted covenants not to compete through superior bargaining position," 722 F.2d at 1378, as in *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 119 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); and *United States v. American Tobacco Co.*, 221 U.S. 106, 182-83 (1911). That is exactly what the evidence in this case showed J&J to have sought and achieved. 537 F.Supp. at 1295-99. To the extent J&J did not exact the employment and non-compete agreements through threats and coercion, it did so by fraud and misrepresentation, conduct at least as culpable. *Cf.*, *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979); *Pennsylvania Sugar*, *supra*.

[37]Dissent, 722 F.2d at 1383-84.

action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers v. International Parts*, 392 U.S. 134, 135 (1968); *Continental Ore, supra*, at 696; *Klor's, supra*, at 210. Such is the case here, where the Eighth Circuit decision strikes at the very heart of antitrust enforcement, and raises the question whether the antitrust laws still protect the small entrepreneur, inventor, and developer of new ideas and products.

II.

This Court Should Take the Opportunity to Reaffirm that the Acquisition of a New Product or Idea for the Purpose of Suppressing It Constitutes a Per Se Violation of Section 1 of the Sherman Act.

The trial court in this case instructed the jury that it would be a per se violation of Section 1 of the Sherman Act if the jury found "the intentional suppression of a potentially competitive product from a substantial market by a dominant competitor in the market."[38] The Eighth Circuit majority found the plaintiffs lacked standing, and thus did not reach the propriety of this instruction.

Because the plaintiffs believe the trial court's per se instruction to be entirely proper and in accord with this Court's decisions, or alternatively to raise an important unsettled question this Court should resolve; and because the plaintiffs seek to avoid an unnecessary retrial of their antitrust claims in light of the five-month trial already conducted; the plaintiffs ask this Court to grant certiorari to review the instruction and suppression as an antitrust violation.

The plaintiffs respectfully submit that acquisition of a competitive product or business for the purpose of suppression is one of the oldest, most fundamental, and most pernicious restraints of trade

[38] 537 F.Supp. at 1337; T.12735-36.

imaginable, and this Court has long held the illegality of such conduct to be beyond challenge. So that lower courts will no longer disregard this Court's decisions or question the illegality of such conduct, this Court should grant certiorari in order to make clear that such conduct is per se illegal and not to be tolerated.

This Court has twice said that it is "unreasonable, per se, to foreclose competitors from any substantial market." *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *United States v. Griffith*, 334 U.S. 100, 107 (1948). In various cases, lower courts have also applied this self-evident rule.[39] This is of course exactly what J&J did in this case, and what the trial court's instruction required the jury to find in order to establish a per se violation.

Moreover, this ancient and basic restraint is at the heart of many of this Court's seminal antitrust decisions; and, in every such decision, this Court has condemned such conduct out of hand. *Northern Securities Co. v. United States*, 193 U.S. 197, 340 (1904); *United States v. Reading Co.*, 253 U.S. 26, 57 (1920)[40]; *United States v. American Tobacco Co.*, 221 U.S. 106, 180-83 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 74-75 (1911); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-29 (1947).

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[39] *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138, 1145 (8th Cir. 1969); *United States v. United States Alkali Export Association*, 86 F.Supp. 59, 67 (S.D.N.Y. 1949); *Fashion Originators Guild of America, Inc. v. Federal Trade Commission*, 114 F.2d 80, 85 (2nd Cir. 1940, Hand, J.) *aff'd* 312 U.S. 457 (1941); *Local 36 of International Fisherman, etc. v. United States*, 177 F.2d 320, 331 (9th Cir. 1949); *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869, 873 (4th Cir. 1950); *Pennsylvania Water and Power Co. v. Consolidated G., E., L., & P. Co.*, 184 F.2d 552, 558 (4th Cir. 1950).

[40] This case, like *Northern Securities*, involved consolidation of competing railroads for the purpose of suppressing competition between them. In finding the arrangement to violate Section 1 of the Sherman Act, the Court held: "Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control. That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the antitrust act, has been frequently held by this Court." The *Reading* case was typical of a line of cases in which the Court condemned acquisitions involving competing railroads for the purpose of suppressing competition between them. *United States v. Union Pacific R. Co.*, 226 U.S. 61, 86 (1912); *United States v. Lehigh Valley R. Co.*, 254 U.S. 255, 258-61, 263-64, 269-70 (1920); *United States v. Southern Pacific Co.*, 259 U.S. 214, 229-31 (1922).

In *Yellow Cab*, the Court found violations of the Sherman Act arising out of the acquisition and combination of competing cab companies for the purpose of suppressing competition between them. If there is any difference at all between this case and *Yellow Cab*, it is that, unlike the cab companies who willingly combined, the plaintiffs here were tricked into the anticompetitive affiliation—a circumstance that makes the misconduct of the defendant even worse.

Nor is there any question that the violation is per se. If plaintiffs had willingly agreed to suppress TENS by restricting sales only to certain chronic pain patients—which is exactly what J&J in fact achieved—J&J would face per se liability for a horizontal division of markets or customers. There can be no different result here, where J&J has achieved the very same combination by fraud and duress, so that per se liability attaches *a fortiori*.

Moreover, per se illegality is even more appropriate in light of the standards of the rule of reason—the balance between anti-competitive and pro-competitive effects from the conduct in question. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). In *Chicago Board of Trade*, the Court said, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." *Id.*, at 283.

Nothing suppresses or destroys competition like suppression—acquiring new ventures for the purpose of suppressing them. There are no justifications or benefits that anyone can raise in defense of such a practice. Significantly, J&J has never attempted to advance pro-competitive justifications for suppressing TENS. Rather, it has sought to deny engaging in such conduct, no doubt because it knows it cannot justify the conduct, if admitted.

Nor should suppression be confused with a decision not to market or promote a product already in-house, as the Eighth

Circuit majority apparently did.[41] Not only does the latter situation not exist here (J&J has claimed it did its best to promote TENS), but also this case presents a situation where J&J affirmatively went outside itself to acquire a new product in order to suppress it.

As the trial court aptly recognized, there can be no conceivable justification for such a practice, which presents a restraint of trade even more basic and harmful than price fixing, where at least a product is available to the public at an inflated price. 537 F.Supp. at 1338. This Court itself has recognized that if it is to proscribe price fixing as per se illegal, it must likewise attach per se treatment to practices that eliminate competitors altogether. *United States v. General Motors Corp.*, 348 U.S. 127, 148 (1966).

Per se liability for acquiring to suppress also accords with this Court's rulings that Section 1 proscribes conduct of a pernicious nature or effect regardless of the amount of commerce affected[42]; that Section 1 forbids conduct that, if left unchecked, will tend inevitably to monopoly[43]; that the antitrust laws are concerned with protecting the freedom of individual traders[44]; and that per se rules are important in providing standards and certainty in the administration of the antitrust laws, and in condemning practices without redeeming virtues.[45]

The record in this particular case certainly supports the per se instruction given by the trial court: J&J presented no justification or explanation for its misconduct, but simply denied it; the substantiality of the market involved and J&J's dominance therein were clear; and J&J also engaged in other per se violations in imple-

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[41]722 F.2d at 1379, citing *GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1231 (S.D.N.Y. 1981).

[42]*Fashion Originators Guild, supra*, at 476; *Klor's, supra*, at 210; *International Salt, supra*, at 396.

[43]*Northern Securities, supra*, at 340; *Standard Oil, supra*, at 61-62.

[44]See fn.32-33, *supra*.

[45]*Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Maricopa County Medical Society, supra; Topco, supra; Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

menting its overall plan to suppress, such as forcing StimTech and other J&J subsidiaries to agree on divisions of markets and price fixing arrangements.[46]

On such a record, if the plaintiffs have standing (and they do), there is more than sufficient evidence to establish a violation of Section 1. For the sake of the efficient administration of justice and the proper and consistent application of the antitrust laws, plaintiffs request this court to grant certiorari, to approve the trial court's instruction, and to declare that acquisition for the purpose of suppression is a per se violation of Section 1 of the Sherman Act, unlawful and intolerable.

III.

The Trial Court Properly Upheld the Jury's Award of Antitrust Damages.

As with the trial court's per se instruction, the plaintiffs ask this Court to review the trial court's decision upholding the antitrust damage award in the interest of the efficient administration of justice and the avoidance of another prolonged trial. None of the Eighth Circuit judges reached the damage question, but the plaintiffs submit that this Court can and should affirm the trial court's upholding of the damage award, as being consistent with the evidence in the record and this Court's decisions.

At trial, J&J itself placed in evidence an accountant's damage study supporting a damage award of $80 million, $23 million more than the jury awarded. Counsel for J&J stated, with respect to this damage study, that counsel for plaintiffs "can argue whatever he wants from it."[47] J&J also permitted plaintiff Hagfors to testify on

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[46]Dissent, 722 F.2d at 1386-87; 537 F.Supp. at 1300-03, 1316-17, 1333-34.

[47]537 F.Supp. at 1362; T.3991-94, 8484, 12549-51; DX 345; PX 940.

direct and cross examination, without objection, that, in the absence of J&J, the plaintiffs could have done at least as well as two other successful pacemaker companies.[48]

Significantly, the pacemaker evidence alone is sufficient to sustain the jury's damage award, without regard to the damage evidence concerning TENS. The two pacemaker companies used as damage models were Cardiac Pacemakers, Inc. ("CPI"), and Intermedics, both of which were started by former colleagues of the plaintiffs after the plaintiffs founded StimTech. Each of these companies developed pacemaker products the plaintiffs intended to develop at StimTech before J&J stopped them. Each of these companies went from a loss position and minimal sales to profitability and multimillion dollar sales in the five-year period in which J&J was suppressing the plaintiffs' business. In 1978, the Eli Lilly Company bought CPI for slightly more than $100 million, while J&J was secretly negotiating to purchase CPI for a price in the same range. The evidence is that Intermedics had a comparable value.

The antitrust damages awarded by the jury, $56.8 million, equal roughly half of the profits and value of CPI or Intermedics during the damage period. The testimony of the plaintiffs, unrebutted and unchallenged, was that in the absence of J&J, the plaintiffs would have sold a half interest in their business to raise capital, and retained half-ownership for themselves. Thus, the jury's award equals the plaintiffs' share in the profits and value they would have realized from their pacemaker business, had their pacemaker business developed comparably to CPI or Intermedics. The trial court found this comparison to be sound. 537 F.Supp. at 1358. Nor did J&J object to it.

As this Court has long recognized, the use of comparisons is entirely appropriate in calculating antitrust damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Zenith Radio Corp. v. Hazeltine Research*, 327 U.S. 100 (1969). In addition, anti-

[48] 537 F.Supp. at 1309-10, 1357-58; T.2465-76, 2521-24, 4132, 4864-65, 4899; PX 374, 944, 1317.

trust damages need not be calculated with absolute exactness; it is sufficient if a reasonable basis of computation is afforded, although the result be only approximate, as a matter of just and reasonable inference. *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Moreover, where the damages are uncertain by reason of the defendant's violation, as here, then the defendant must bear the burden of the uncertainty. *Story Parchment, id.*, at 565. Finally, this Court has admonished that "trial and appellate courts alike must also observe" that these rules are particularly applicable in market exclusion cases, such as this, because "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra*, at 123.

Here, there is no question that J&J deliberately destroyed the plaintiffs' pacemaker business to stop it from subsidizing the TENS business.[49] Accordingly, the trial court properly sustained the recovery of antitrust damages related to the pacemaker business. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1273 (8th Cir. 1980).[50]

Besides pacemaker damages, the plaintiffs presented estimates of lost profits and value with regard to TENS sales. The trial court carefully reviewed this evidence, and concluded that it was sufficient to serve as a basis for the jury's finding as to the amount of damages. 537 F.Supp. at 1359-62. The court's conclusion that the assumptions underlying the plaintiffs' "damage schedule are reasonable and consistent with reality," 537 F.Supp. at 1362, is fully in accord with the evidence.[51]

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[49]537 F.Supp. at 1357; T.2510-11, 2563.

[50]See, also, *Dean Food Co. v. Albrecht Dairy Co.*, 396 F.2d 652, 661 (8th Cir. 1968); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 689 (8th Cir. 1966).

[51]T.3603-31, 3649-58, 3892-95; PX 150, 374, 382, 944, 1217. For example, the evidence showed that J&J blocked the plaintiffs from selling in Japan, where by 1976 a single Japanese company was selling more than 180,000 TENS devices annually over the counter, more than all U.S. TENS company sales combined.

Significantly, the court found the antitrust damage award to be fully supported solely by evidence J&J's own witnesses and counsel placed in the record. 537 F.Supp. at 1362-63.

For example, witnesses called by J&J testified that the earnings multiple and net profit percentage used by the plaintiffs in computing damages were reasonable and conservative; that the plaintiffs were correct that increased TENS volume would reduce the price of TENS; and that the potential for TENS sales was huge.[52]

Even the witnesses called as experts by J&J gave testimony to support the plaintiffs' damage evidence. Robert Wingrove, president of a small TENS company, testified that if TENS were able to make inroads against drugs in the treatment of various pain states, then the numbers in the plaintiffs' damage evidence would be "probably logical." Mr. Wingrove admitted that he would have no problem accepting the plaintiffs' damage estimates if he looked at the plaintiffs' numbers in terms of the market for painkilling drugs, with which he admitted TENS competed.[53]

Similar corroboration for plaintiffs' damages came from two other experts called by J&J: Donald Maurer, president of another small TENS company; and Ronald Esau, an accountant who prepared a computer model of the plaintiffs' business based upon the sales and profits claimed as damages by the plaintiffs.[54]

As admitted by J&J's own witnesses, the amounts claimed as damages by the plaintiffs, as well as the actual award, are not large or disproportionate in the overall context of sales of pain control drugs. Once the jury concluded that TENS devices and drugs were in actual competition, as the evidence clearly permitted, then the jury was looking at a billion dollar annual market in which to sell

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[52]T.2916-20, 5032-33, 5294-96, 5561, 5640-41, 5697-98, 6805, 6891, 7142-43, 7243, 7732-40; PX 2, 27, 81; DX 173, 216.

[53]T.10962, 10981, 10989-90, 10999-11000, 11002, 11006-07, 11043, 11045, 11048.

[54]537 F.Supp. at 1362-63; T.12018-20, 12029-30, 12037-42, 12050-52, 12403-05, 12428-32, 12443-58, 12460-63, 12470-84; PX 382, 1217, 1229; DX 338.

TENS, a product more effective and safer than pain control drugs. In fact, the damages claimed by the plaintiffs were consistent with the actual performance of J&J's pain control drugs. Combined profits of Tylenol and Tylenol with codeine from 1975 through 1979 were $134 million; the lost profits claimed by the plaintiffs for TENS sales during the same period were $90 million. The plaintiffs' damage estimates likewise show a striking correlation to the actual performance of Zomax after its launch by J&J, before the drug's lethal side effects forced its withdrawal from the market.[55]

The jury of course returned a verdict substantially less than the full amount claimed by the plaintiffs. In light of the evidence in the record, however, much of it there at the instance of J&J, there is no valid basis for vacating or reducing the jury's award, particularly when the evidence would have justified much more. 537 F.Supp. at 1362.

Therefore, in the interest of the efficient administration of justice and the avoidance of another protracted trial in this case, the plaintiffs ask this court to grant certiorari to review and affirm the antitrust damage award.

IV.

The Eighth Circuit Majority's Reversal of the Fraud Punitive Damage Award Was Error and Contrary to 28 U.S.C. § 2111, the Harmless Error Statute, and Federal Rule of Evidence 103.

Finally, the plaintiffs ask this Court to review the Eighth Circuit majority's reversal of the plaintiffs' punitive damage award for fraud, inasmuch as reversal of the punitive damage award is closely allied to the majority's decision on antitrust standing, and also raises an important question as to the scope of 28 U.S.C. § 2111, the harmless error rule in appellate procedure, and Federal Rule

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[55]T.2830-39, 10958-59, 12567-68; DX 345; PX 940.

of Evidence 103, which requires objection to improper matter in order to preserve a claim of error.

Because the Eighth Circuit majority found no standing for the plaintiffs' antitrust claims, the majority concluded that the plaintiffs could not properly have argued suppression in connection with the punitive damage award for fraud. 722 F.2d at 1381-83.

The majority arrived at this conclusion although the plaintiffs' mention of suppression in the punitive damage argument went directly to J&J's motive for the fraud; the allegedly improper comments took merely a few minutes in two days of hotly contested closing argument at the end of a five-month trial; J&J made no objection to the closing argument either at trial or in its post-trial motions; and J&J repeatedly admitted getting a fair trial, even when the jury was deliberating *after* closing argument.

The dissent quite correctly rejected the majority's decision, and pointed out that the suppression was an integral part of J&J's fraud, and could therefore properly be raised in conjunction with the punitive damage award.[56] The suppression was clearly the motive for the fraud, and therefore relevant in connection with the award of punitive damages. *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 498-99 (1961)[57]; *Mauala v. Milford Management Corp.*, 559 F.Supp. 1000, 1006 (S.D.N.Y. 1983); *Brink's, Inc. v. City of New York*, 546 F.Supp. 403, 412 (S.D.N.Y. 1982); *Banco National De Costa Rica v. Bremar Holdings*, 492 F.Supp. 364, 373 (S.D.N.Y. 1980); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358, 353 N.E.2d 793, 795 (1976). Thus, the plaintiffs' closing argument was proper.

Even if plaintiffs' closing argument was in some way objec-

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[56]722 F.2d at 1387: "In my view, the jury was correctly instructed as to punitive damages [the majority agreed] and that award should be permitted to stand. The fraud on the part of J&J was entering into the agreement with plaintiffs with the intent to suppress the TENS devices. J&J's conduct is a breach of contract, an act of fraud, and an act of suppression prohibited by the Sherman Act."

[57]"Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future."

tionable, however, J&J did not object, gave the plaintiffs and the trial court no chance to remedy the alleged error (easily correctable through a cautionary instruction), and thereby waived any claim of error on appeal. Federal Rule of Evidence 103; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-40 (1940); *Harris v. Zurich Insurance Co.*, 527 F.2d 528, 532 (8th Cir. 1975); *Sanden v. Mayo Clinic*, 495 F.2d 221, 227 (8th Cir. 1974).

The only possible basis for reversing the punitive damage award in the absence of objection is the plain error rule, which permits consideration of an issue not raised in the trial court only "in extraordinary cases, and then only to avoid a clear miscarriage of justice." *Ralston Purina Co. v. Parsons Feed & Farm Supply*, 364 F.2d 57, 60 (8th Cir. 1966). The majority, however, both overlooked J&J's failure to object in the trial court, and neglected to state that it was invoking the plain error rule and the basis for doing so.

Of all cases, this is the least suitable for the plain error rule. Not only has there been a failure to object or claim error at trial; there has been conduct by J&J affirmatively waiving any claim of error. J&J repeatedly stated throughout the trial that it was receiving a fair trial, the last of these admissions coming while the jury was deliberating, *after* closing argument.[58] Both this Court and the Eighth Circuit have frequently stated, "A litigant is entitled to a fair trial but not a perfect one." *E.g.*, *Lutwak v. United States*, 344 U.S. 604 (1953); *Griffith v. Edwards*, 493 F.2d 495 (8th Cir. 1974). Moreover, this firmly established principal of law originated and appears most frequently in criminal cases. *Lutwak, supra; Bruton v. United States*, 391 U.S. 123 (1968). Since a defendant in a criminal case is entitled only to a fair trial and not a perfect trial, *a fortiori*, a defendant in a civil case, such as J&J, is entitled to no more.

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[58]T.324-25, 5449, 7536, 13215.

Of course, this is exactly what J&J admitted getting, a fair trial, all the justice to which it was entitled. Even in the course of its appeal in the Eighth Circuit, J&J expressly conceded that it "never on appeal raised a claim of lack of procedural due process or unfairness in the conduct of the trial."[59]

The rule that a litigant is entitled only to a fair trial, not to a perfect trial is of course consistent with and mandated by the harmless error rule, that "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the party." FRCP 61; 28 U.S.C. § 2111; *Palmer v. Hoffman*, 318 U.S. 109 (1943).

Moreover, the burden of showing that an error is prejudicial, i.e., not harmless, rests on the appellant, here J&J, who had to show both that there was error, and that it was prejudicial. Having admitted getting a fair trial and having failed to object, however, J&J cannot possibly show prejudicial error, even if it could show error at all.

For the majority to have invoked the plain error rule in J&J's favor, *sub silentio*, flies directly in the face of 28 U.S.C. § 2111, as well as this Court's decision in *Socony-Vacuum, supra.*

In *Socony-Vacuum*, this Court did not reverse *criminal* antitrust convictions despite finding highly improper, prejudicial, and inflammatory closing argument by government counsel, directed not to the evidence in the record, as here, but to the personal prejudices of the jurors. Central to the Court's finding of harmless error was the length of the trial, the vigor with which the case was litigated, and the isolated nature of the prejudicial remarks, all circumstances present here. If such argument was harmless error in *Socony-Vacuum*, then it is harmless error here, in a civil case, where there has been no objection to a much less objectionable argument, a five-month trial, and repeated admissions by J&J that it received a fair trial.

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[59]Reply Brief of Appellant, p. 16.

Accordingly, the plaintiffs respectfully request this Court to grant certiorari to reverse the majority's decision and reinstate the punitive damage award in the interest of the efficient administration of justice.[60]

V.

Conclusion

On the basis of the foregoing arguments and authorities, the plaintiffs respectfully petition this Court for a writ of certiorari to review the questions presented herein. The basic issue this petition presents is whether the antitrust laws protect three businessmen who developed a cure for pain and saw that cure suppressed by the world's most powerful health care company. If the antitrust laws are to retain their vigor, and their underlying spirit and purpose are to survive, then this Court should and must say so and grant the plaintiffs' petition in this case.

Respectfully submitted this 10th day of April, 1984.

GRAY, PLANT, MOOTY, MOOTY
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[60]As the dissent found, the amount of the punitive damage award was proper, 722 F.2d at 1387, being four times the actual damages, a ratio expressly approved by the Eighth Circuit in fraud cases. *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1349-50 (8th Cir. 1976).